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In the Supreme Court of the United States

OCTOBER TERM, 1992

LAMB'S CHAPEL, ET AL., PETITIONERS

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

Whether a public school district may constitutionally bar a local group from using school facilities, on the same basis as other members of the public, solely because their otherwise permissible proposed use evinces a religious point of view.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	7
Argument:	
I. This case is controlled by the Court's previous decision in *Widmar* v. *Vincent*	8
II. Even if the exclusion of religious speech is not invalid under *Widmar*, the exclusion of petitioners' proposed lecture series constitutes unjustified viewpoint-based discrimination and violates the First Amendment	15
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Adderly v. *Florida*, 385 U.S. 39 (1966)	9
Chess v. *Widmar*, 635 F.2d 1310 (8th Cir. 1980), aff'd *sub nom. Widmar* v. *Vincent*, 454 U.S. 263 (1981)	15
City of Madison Joint Sch. Dist. No. 8 v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976)	10
Cornelius v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985)	1, 9, 10, 15, 18
Deeper Life Christian Fellowship, Inc. v. *Sobol*, 948 F.2d 79 (2d Cir. 1991)	3
Greer v. *Spock*, 424 U.S. 828 (1976)	9, 10, 19, 20
Hazelwood Sch. Dist. v. *Kuhlmeier*, 484 U.S. 260 (1988)	9
International Soc'y for Krishna Consciousness v. *Lee*, 112 S. Ct. 2701 (1992)	9, 10, 15, 18
Jones v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977)	10, 19

Cases – Continued: Page

Lee v. *Weisman*, 112 S. Ct. 2649 (1992) 2
Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974) 10
Perry Educ. Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) 1, 8, 9, 10, 18
Rust v. *Sullivan*, 111 S. Ct. 1759 (1991) 19, 20
Trietley v. *Board of Education*, 409 N.Y.S.2d 912 (App. Div. 1978) 3
United States v. *Kokinda*, 110 S. Ct. 3115 (1990) .. 1, 9, 18
United States Postal Service v. *Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) 1, 8
Westside Community Bd. of Educ. v. *Mergens*, 496 U.S. 226 (1990) 2, 3, 12, 20
Widmar v. *Vincent*, 454 U.S. 263 (1981) 7, 9, 11, 12 13, 14, 18, 20, 21
Zorach v. *Clauson*, 343 U.S. 306 (1952) 20

Constitution, statutes and rules:

U.S. Const.:
Amend. I 9, 12, 16, 18, 20
Establishment Clause 2, 3, 7, 12, 20
Free Exercise Clause 7
Freedom of Assembly Clause 7
Freedom of Speech Clause 7
Amend. XIV (Equal Protection Clause) 7
Equal Access Act, 20 U.S.C. 4071 3
10 U.S.C. 7204 2
22 U.S.C. 2701 2
25 U.S.C. 271-304b 2
N.Y. Educ. Law (McKinney 1988):
§ 414 ..... 2, 3, 4
§ 414(c) 2, 4, 11, 14, 16, 17
§ 414(d) 2
§ 414(e) 4, 11, 14
§ 414(j) (Supp. 1992) 3

Rules – Continued: Page

Center Moriches Union Free School District, Rules and Regulations for Community Use of School Facilities:
Rule 1 3
Rule 3 4
Rule 4 3
Rule 6 3
Rule 7 ..... 4, 11, 12
Rule 8 ..... 4, 11
Rule 9 ..... 4, 11, 14
Rule 10 ..... 4, 17
Rule 11 4
Rule 17 3
Rule 18 3
Rule 19 3

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INTEREST OF THE UNITED STATES

This case presents the question whether a public entity may exclude particular speech from a forum that it has opened at least partially for public expression, solely on the basis of the speech's religious point of view. The United States is the proprietor of numerous non-public and "designated" or "limited" public forums, and accordingly has an interest in the outcome of this case. The United States has participated, as a party or amicus curiae, in numerous cases involving similar issues, including *United States* v. *Kokinda*, 110 S. Ct. 3115 (1990); *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); and *United States Postal Service* v. *Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981).

This case also raises issues under the Establishment Clause of the First Amendment, in particular the proper accommodation of religious speech in the context of public property. The United States has a significant interest in these issues as well, both generally and as the proprietor of public property, including public schools. See, *e.g.*, 10 U.S.C. 7204 (schools for Navy dependents); 22 U.S.C. 2701 (foreign service dependents); 25 U.S.C. 271-304b (Native Americans). The United States has participated in numerous cases involving the Establishment Clause, including most recently *Lee* v. *Weisman*, 112 S. Ct. 2649 (1992) (public school graduation ceremony), and *Westside Community Bd. of Educ.* v. *Mergens*, 496 U.S. 226 (1990) (statutory policy of equal access for religious speech).

STATEMENT

Section 414 of the New York Education Law provides that local school districts may make property under their control available during non-school hours for various specified activities. These include "holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public." N.Y. Educ. Law 414(c) (McKinney 1988). Section 414 itself places no limitation on otherwise permissible social, civic, recreational or community welfare uses of school property based on the religious content of a particular proposed activity.[1]

[1] Section 414 by its terms imposes restrictions on religious organizations or activities in only two specific and limited contexts. Section 414(d) provides that admission may not be charged for "meetings, entertainments and occasions" on school property if such activities "are under the *exclusive* control, *and* the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society • • • " (emphasis added). Section 414(j), added in 1991, permits use of public school facilities for "graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed."

A New York appellate court ruled in 1978, however, that a local school board had no authority under Section 414 to allow student "bible clubs" to meet on school property, because "[r]eligious purposes are not included in the enumerated purposes for which a school may be used under section 414." *Trietley* v. *Board of Education*, 409 N.Y.S.2d 912, 915 (App. Div. 1978). The Second Circuit has accepted, as an authoritative interpretation of state law, *Trietley*'s holding that Section 414 excludes religious uses of school property, see *Deeper Life Christian Fellowship, Inc.* v. *Sobol*, 948 F.2d 79, 83-84 (1991), and the Attorney General of New York advances the *Trietley* analysis in this proceeding. See N.Y. Att'y Gen. Br. in Opp. 2-4, 10-13.[2]

Respondent Center Moriches Union Free School District (CMSD) has implemented Section 414 through local rules and regulations. Pet. App. 56a-59a. Most of the local rules are procedural (*e.g.*, Rule 1 (application forms), Rules 18-19 (permit must be signed by administrator and exhibited upon request)) or prescribe neutral restrictions unrelated to the purpose or content of the proposed activity (*e.g.*, Rule 4 (restrictions on refreshments), Rule 6 (insurance requirements), Rule 17 (smoking)).

[2] We note that since 1984 the federal Equal Access Act, 20 U.S.C. 4071, would likely dictate a different result on the facts of *Trietley* (perhaps with slight modifications in the planned operation of the proposed bible clubs). See *Westside Community Bd. of Educ.* v. *Mergens*, 496 U.S. 226 (1990). In particular, the New York court's discussion of the Establishment Clause, 409 N.Y.S.2d at 916-917, could not stand after *Mergens*.

Several rules do, however, regulate in one way or another the "content" of permitted events. Rule 10, for example, provides a more specific gloss on the term "general public" as used in Section 414(c).[3] Other rules reflect Section 414's limits on political events (Rule 8)[4] and events where admission is charged (Rule 11), and prohibit use for "personal or private gain" (Rule 9) or for events involving gambling or the consumption of "intoxicating beverages" (Rule 3). Finally, Rule 7 makes explicit the restriction that respondents contend is implicit in the state statute: "The school premises shall not be used by any group for religious purposes."

Under Section 414 and its local rules, CMSD has opened its facilities to a wide variety of community uses. From 1987 through 1990, for example, groups receiving permits included the Southern Harmonize Gospel Singers; the Salvation Army Youth Band; the Moriches Bay Power Squadron; the Unkechaug Dance Group; the Holiday Beach Property Owners Association; and the Girl, Boy and Cub Scouts. During the same period, CMSD issued permits for, among other activities, a concert sponsored by the Hampton Council of Churches/Family Counseling Services; the Center Moriches Co-op Nursery School Quilting Bee; the Moriches Pa-Qua-Tuck Squaws' Chinese Auction; the Chamber of Commerce's Town Fair Day

[3] Rule 10 provides that "[a] permit for social, civic, or recreational use shall be approved only if it can be non-exclusive and open to all residents of the school district that form a homogeneous group deemed relevant to the event."

[4] Section 414(e) provides that facilities may be made available for "polling places • • • and registration of voters and for holding political meetings," but that "no meetings sponsored by political organizations shall be permitted unless authorized" by a local board or district meeting. Local Rule 8 merely provides that "use of the premises by political organizations must be secured in compliance with Section 414." See n. 9, *infra*.

(and its Annual Duck Race); the Center Moriches Music Award Association's presentation of "Amahl & the Night Visitors"; the Brookhaven Kennel Club's dog obedience and "breed handling" classes; and a lecture series, sponsored by the local public library, that featured a psychotherapist speaking on "parapsychology and transpersonal psychology and [dealing] with eastern mysticism and metaphysics."[5] See Pet. App. 19a-20a nn.4-5; Pet. 4-5.

Petitioner Lamb's Chapel is an evangelical Christian church located in the community of Center Moriches, New York, and petitioner John Steigerwald is its pastor. Pet. App. 2a-3a. In 1988 and 1989, petitioners twice applied for a permit to use CMSD facilities to show a six-part film series featuring lectures by Dr. James Dobson[6] on child-rearing issues confronting modern parents. See Pet. App. 5a-6a; C.A. App. 348-359. According to a brochure provided to school officials, in the series "America's most trusted family life expert brings his vast experience to bear on one of society's most pressing challenges—the protecting and strengthening of family relationships." C.A. App. 354. Dr. Dobson "portrays the pressures today's parents are susceptible to," and reminds his audience of "the undermining influences of radio, television, films and the

[5] The district court recited testimony offered by petitioners that "the lecturer on parapsychology from the Mind Center • • • discussed, among other things, spiritual growth, channeling, out-of-body experiences, and kundalini and the centers of the body." Pet. App. 46a.

[6] The brochure for the film series that was provided to the school authorities, C.A. App. 353-356, describes Dr. Dobson as a licensed psychologist and former associate clinical professor of pediatrics at the University of Southern California, author of nine "best-selling" books, radio commentator, and president of Focus on the Family, "a non-profit corporation dedicated to the preservation of the home." *Id.* at 356.

press – which can only be counterbalanced by a loving home where Christian values are instilled from an early age." *Ibid.* Stressing a renewed commitment to the family, the brochure concludes that "the purpose of this powerful new film series [is] to challenge [concerned] individuals to return to the traditional values upon which families are best created and nurtured." *Ibid.*

The brochure briefly summarizes each of the series' six parts. C.A. App. 354. The first film, for example, "emphasizes how swiftly time passes and appeals to all parents to 'turn their hearts toward home' during the all-important child-rearing years." The second film, "Power in Parenting: The Young Child," is said to "offe[r] many practical helps for facing the battlegrounds in child-rearing – bedtime, mealtime and other confrontations so familiar to parents," as well as examining "areas of conflict in marriage and other adult relationships." The third film deals with teenage rebellion and "discusses father/daughter and mother/son relationships, and the importance of allowing children to grow and develop as individuals." The fourth film discusses the family and related public policy issues in the context of a modern "civil war of values," while the fifth features Dr. Dobson's wife recalling "a difficult childhood with her alcoholic father" and "the influences which brought her to a loving God." The concluding segment emphasizes "four traditional values which, if properly employed and defended, can assure happy, healthy, strengthened homes and family relationships." *Ibid.* Overall, petitioners described the series in their second permit application (C.A. App. 357-358) as a "family oriented movie from a Christian perspective." In that context, petitioners have never disputed that the series is "of a religious nature" and would be shown "for a religious purpose." Pet. App. 36a (district court opinion).

Petitioners' requests to use school facilities to show the Dobson lectures were denied because they "appear[ed] to be church related." C.A. App. 352, 359; Pet. App. 5a-6a. Petitioners challenged the denial in the district court as a violation of their rights under the Freedom of Speech and Assembly, Free Exercise, Establishment and Equal Protection Clauses. The district court granted summary judgment for CMSD, holding that CMSD had created a "limited public foru[m]" (Pet. App. 31a, 44a) by opening its facilities to various public uses, but that it had not allowed "organizations of similar character to Lamb's Chapel to use its facilities for religious purposes," and that therefore its denial of the permit on religious content grounds was "viewpoint-neutral and, hence, constitutional." *Id.* at 31a-32a.

The court of appeals affirmed. It agreed with the district court that CMSD had created a "limited public forum," Pet. App. 10a, that the school district could legitimately exclude "religious uses" from that forum, and that it had, in fact, consistently done so. *Id.* at 10a-14a. Because it was unable to identify "any prior use of [CMSD] facilities for purposes that are religious in any meaningful way," the court concluded that "the facilities were limited forums not opened to religious uses by policy or practice and that there was no constitutional violation in the failure of the School District to afford access" to petitioners. *Id.* at 14a.

SUMMARY OF ARGUMENT

We believe that this case is controlled by the reasoning and result in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). A governmental proprietor such as CMSD has broad discretion to restrict expressive activity in its facilities in ways reasonably related to their central purposes, including generally imposing restrictions on the types of speakers or

the subject matter of the speech to be allowed. Although the school district was under no constitutional obligation to afford the general public access to its facilities, however, it in fact adopted a policy of allowing wide access for "social, civic and recreational" events and "other uses pertaining to the welfare of the community." Having done so, it was required to provide equal access for petitioners' religious speech. The facts of this case do not distinguish it from *Widmar*, and we believe that decision compels judgment in favor of petitioners here.

Even if *Widmar* does not dictate the result, however, respondents' regulation must fail as applied in this case. Once a governmental proprietor has opened a forum to a general type of speech, such as lectures on matters of public concern, it may not, without particular justification of a sort not proffered here, exclude proposed speech of that type from the forum solely because it advances a religious point of view. CMSD's prohibition on the use of its facilities "for religious purposes," as applied to the lecture series at issue in this case, violates this basic principle.

ARGUMENT

I. THIS CASE IS CONTROLLED BY THE COURT'S PREVIOUS DECISION IN *WIDMAR* v. *VINCENT*

As this Court has repeatedly held, "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service* v. *Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). Rather, "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

In "traditional public forums," such as streets and parks, and in places that the government has itself opened for unrestricted expressive use by the general public, the government's ability to regulate speech is distinctly circumscribed and subject to strict constitutional scrutiny. See, *e.g.*, *Perry*, 460 U.S. at 45. The government may, on the other hand, severely restrict or even deny access to public facilities that are not traditional forums for expression and that the government has not opened for such use, "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806.[7] See, *e.g.*, *Perry*, 460 U.S. at 46 (public school internal mail system); *Adderly* v. *Florida*, 385 U.S. 39 (1966) (prison); *Greer* v. *Spock*, 424 U.S. 828 (1976) (military base); *International Soc'y for Krishna Consciousness* v. *Lee*, 112 S. Ct. 2701 (1992) (airport).

The school auditorium at issue here is not a traditional public forum. See, *e.g.*, *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 267 (1988). This Court has made clear that a public entity may limit the speech that it chooses to permit in such an otherwise nonpublic forum to a relevant class of speakers, such as students on a university campus. See *Widmar* v. *Vincent*, 454 U.S. at 267-268 & n.5. Similarly, several cases have held or reiterated that

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[7] Cases interpreting the First Amendment often speak of a particular ground for regulation of speech as "content-neutral." See, *e.g.*, *United States* v. *Kokinda*, 110 S. Ct. 3115, 3124 (1990) (plurality opinion) (prohibition of solicitation). In the case of a limited public forum, however, it is necessary to distinguish between the exclusion of speech on "a topic not encompassed within the purpose of the forum," *Cornelius*, 473 U.S. at 806, a permissible form of "content" discrimination, and the impermissible exclusion of a particular "point of view," *ibid.* Like the Court in the quoted passage from *Cornelius*, we use the term "viewpoint neutral" to preserve that distinction.

under appropriate circumstances a governmental proprietor may limit the subject matter of speech to which it opens a particular forum. See *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985) (exclusion of "advocacy" groups from charitable fundraising campaign); *Perry*, 460 U.S. at 46 n.7, citing *City of Madison Joint Sch. Dist. No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 & n.8 (1976) (school board business); *Greer* v. *Spock*, *supra* (partisan political rallies and disruptive literature banned from military base although selected other events allowed for benefit of troops); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (political messages excluded from city streetcars although commercial advertising permitted). Cf. *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 133-136 (1977) (prison administrators could grant privileges to Jaycees and Alcoholics Anonymous not granted to illegal and adversarial prisoners' union).

To the extent that the government opens a forum, however, speech within its limits is entitled to the full measure of First Amendment protection. See, *e.g.*, *Krishna Consciousness*, 112 S. Ct. at 2705; *Perry*, 460 U.S. at 48 (limited forum extends to uses "similar [in] character" to those government has permitted). Thus, New York and CMSD have considerable discretion in managing their public property in ways consistent with its fundamental purposes.[8] If they choose to open their facilities to public speech largely unrelated to those purposes, however, the permissible scope of further regulation of that speech may be considerably narrowed.

[8] They could, for example, choose at any time to grant after-school access to public school facilities only to student groups or to groups of special interest to students, or only for public discussion of school-related business.

In fact, the State and the school district have by policy and practice permitted significant, non-school related public use of the district's facilities. State law authorizes use of school facilities for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," so long as such events are "non-exclusive and * * * open to the general public." N.Y. Educ. Law 414(c). Under this provision, CMSD has made its facilities available to a wide, although not wholly indiscriminate, variety of groups and uses. Indeed, the rules for the use of school facilities impose only three potentially significant restrictions on the otherwise nearly plenary category of social, civic, recreational, and community welfare uses: permitted events must not be "for personal or private gain," Local R. 9; they must not be "sponsored by political organizations" unless specially authorized, Local R. 8;[9] and they must not be "for religious purposes," Local R. 7.

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court struck down a state university's regulation barring use "for purposes of religious worship or religious teaching" of university facilities otherwise made widely available for use by student groups. See *id.* at 265. The Court found, without any extended discussion of the particular types of student groups involved or their specific non-religious activities, that by routinely allowing use of its facilities

[9] Section 414(e) of the Education Law and Local Rule 8 provide that "political organizations" may sponsor meetings in school facilities only if "authorized by a vote of a district meeting * * * or, in cities by the board of education thereof." The theoretical scope and practical application of this restriction are not apparent, from the face of the statute or from the record. To the extent that it is applied to exclude otherwise permissible activities because of the political viewpoint of their sponsors, it is constitutionally suspect for the same reasons that apply to the "religious purposes" rule at issue in this case.

for meetings of registered student organizations the university had "created a forum generally open for use by student groups." *Id.* at 267.[10] Because the "religious worship and discussion" excluded from the forum were "forms of speech and association protected by the First Amendment," the exclusion could be upheld only if the university could show that it was "necessary to serve a compelling state interest and * * * narrowly drawn to achieve that end." *Id.* at 269-270. Although it acknowledged that the university's asserted interest in complying with the requirements of the Establishment Clause was "compelling," the Court held that nothing in a policy of "equal access" for religious speech would offend that Clause. *Id.* at 271-275; see also *Westside Community Bd. of Educ.* v. *Mergens*, 496 U.S. 226 (1990).

The reasoning and result in *Widmar* compel a decision for petitioners in this case. As in *Widmar*, the school district here has opened its facilities to a wide variety of expressive activity. As in *Widmar*, it has excluded from those facilities any speech that it deems to be "for religious purposes." Local R. 7. As in *Widmar*, that exclusion is, at least as applied in this case, based on the viewpoint espoused by the excluded speaker. As in *Widmar*, any such exclusion requires constitutional justification by the government – although here, *unlike* in *Widmar*, the government has asserted no justification that is even

[10] The court noted that "a university differs in significant respects from public forums such as streets or parks or even municipal theaters," and disclaimed any implication that the First Amendment required the school to grant "free access" to all its facilities, or to make facilities equally available to both student and non-student groups. 454 U.S. at 267-268 n.5. In the context of the forum it had opened for student groups, however, the university was required to "justify its discriminations and exclusions under applicable constitutional norms." *Id.* at 267.

superficially plausible.[11] Thus here, as in *Widmar*, the exclusion must fail.

The court of appeals attempted to distinguish *Widmar* on the ground that it involved only student groups. Pet. App. 14a-15a. But that distinction is irrelevant. Although CMSD is certainly entitled to limit the use of its facilities to student groups, it has chosen instead to make them available, after school hours, to community groups. The question is therefore, as in *Widmar*, what type of speech – not what type of speaker – may be excluded from the forum that CMSD has itself created. Indeed, if anything, the fact that the speakers *and audience* involved here are not only students but also (and as to petitioners' proposed lecture series, primarily) adult members of the community should further alleviate at least one of the concerns addressed by the Court in *Widmar*: after-school use of school property by adults is presumably even less likely to imply any state control over or sponsorship of the views expressed by individual speakers. See *Widmar*, 454 U.S. at 274 & n. 14.

The court of appeals also implied, without elaboration, a distinction between the degree of access granted to non-

[11] CMSD's contention (see, *e.g.*, CMSD Br. in Opp. 7) that the line drawn by its regulations is between "public" and "private" activity, with all "religious" activity falling in the "private" sphere, hardly bears comment. Suffice it to say that a lecture by a recognized authority on issues of child-rearing and threats to the family in modern American life cannot plausibly be characterized as of less "interest to or [less] for the benefit of the public in general," *ibid.*, than lectures on parapsychology or meetings of the Holiday Beach Property Owners Association. See Pet. App. 13a; Pet. 4. See also n. 15, *infra*. The Attorney General of New York eschews any such argument, but his brief in opposition in this Court provides no substitute; he merely asserts, without argument, that the "religious purpose" distinction drawn by state and local law is "reasonable." N.Y. Att'y Gen. Br. in Opp. 12.

religious groups by the university in *Widmar* and the degree of access granted to such groups by CMSD. Pet. App. 14a-15a. Respondents pressed the same argument throughout their briefs in opposition. But both the court below and respondents place too much weight on a factual distinction that can hardly be extracted from this Court's summary references to the breadth of non-religious access in *Widmar*. Unlike the courts below in this case, see Pet. App. 12a-14a, 45a-46a, this Court in *Widmar* undertook no elaborate review of previously permitted uses to discern whether they were "like" or "unlike" the "religious" uses prohibited by the university's policy.[12]

The only other broad, content-based categorical exclusion from the community forum defined by CMSD, for example, is the exclusion of speech "for personal or private gain." Local R. 9.[13] It is far from clear, however, that that exclusion distinguishes this case from *Widmar*. Nothing in *Widmar* suggests that the university's facilities were open for use by student groups for commercial purposes on the same terms that they were open for non-commercial speech. At any rate, there is no basis for concluding from the opinions in *Widmar* that student access to the university's facilities for non-religious use was substantially broader than that afforded by CMSD to non-commercial "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," N.Y. Educ. Law 414(c), particularly in

[12] Indeed, the Court specifically warned that just this sort of close analysis was the activity most likely to "entangle" government impermissibly in religious questions. 454 U.S. at 272 n.11.

[13] As noted above, the theoretical and practical reach of the restriction on "meetings sponsored by political organizations," N.Y. Educ. Law 414(e), are not clear from the statute, the local rules, or the record in this case. See n. 9, *supra*. In any event, such uses are not categorically excluded, as are religious uses.

light of the history of practically unrestricted non-commercial use revealed by the record. See, *e.g.*, Pet. App. 19a & n.4, Pet. 4-5.[14] Without more, we believe that a fair reading of *Widmar* leads to the conclusion that the policy of generally open access presented by the facts of that case is directly analogous to CMSD's broad opening of its school facilities for community use.

II. EVEN IF THE EXCLUSION OF RELIGIOUS SPEECH IS NOT INVALID UNDER *WIDMAR*, THE EXCLUSION OF PETITIONERS' PROPOSED LECTURE SERIES CONSTITUTES UNJUSTIFIED VIEWPOINT-BASED DISCRIMINATION AND VIOLATES THE FIRST AMENDMENT

It may be difficult in particular cases to decide whether a challenged restriction on speech should be analyzed as a limitation on the extent of the forum that has been created, subject to review only for reasonableness and viewpoint neutrality, or as a limitation on speech within the confines of that forum, subject to strict constitutional scrutiny. See, *e.g.*, *Cornelius*, 473 U.S. at 813-827 (Blackmun, J., dissenting); *Krishna Consciousness*, 112 S. Ct. at 2715-2719 (Kennedy, J., concurring in the judgment). In this case, respondents and the courts below view CMSD's prohibition of an otherwise acceptable presentation because of its perceived "religious purpose" as implementing a legitimate limit on the public forum that CMSD has created in its facilities. See, *e.g.*, Pet. App. 9a-10a, 13a-14a, 31a-32a; CMSD Br. in Opp. 2; N.Y.

[14] The university bulletin quoted at length in the Eighth Circuit's opinion in *Widmar* indicates that the facilities at issue in that case were made available for "cultural, social, educational and recreational programming." The bulletin cites "lectures, symposia, concerts, discussions, receptions, chess and bridge tournaments, • • • [and] other special events" as exemplary uses of the University Center. *Chess* v. *Widmar*, 635 F.2d 1310, 1312 n.1 (8th Cir. 1980).

Att'y Gen. Br. in Opp. 6. Petitioners, on the other hand, contend that CMSD has opened its doors so wide that even if the forum is not wholly open, any remaining limits cannot be applied to exclude religious speech. See Pet. 14-17 & n.9. As just discussed, we believe that *Widmar* compels the conclusion that petitioners are correct.

Whatever the exact limits of the forum at issue here, however, the proper resolution of this case may also be discerned by focusing on the particular speech that the school district seeks to exclude, and on the reasons (or lack of reasons) asserted for that exclusion. Respondents contend, and the courts below found, that CMSD could and did consistently exclude use for "religious purposes" from the types of public use to which it opened its facilities. To allow exclusion of the speech at issue in this case on the basis of vague generalizations about "religious purposes," however, would obscure the fact that what is involved here is discrimination against a particular viewpoint on a topic plainly within the range of otherwise permitted subjects. Because a focused examination reveals that CMSD has excluded petitioners' proposed lecture series solely because of the religious *viewpoint* offered by the lecturer, the school district's decision cannot withstand First Amendment scrutiny.

The lectures at issue here addressed a topic—problems of the contemporary American family—that is unquestionably a matter of public concern. A meeting held to discuss that topic would certainly qualify, in general, as a "civic • • • meetin[g] • • • pertaining to the welfare of the community." N.Y. Educ. Law 414(c). We do not understand respondents to contend otherwise. Moreover, there is no contention that petitioners' program would not have been "non-exclusive and • • • open to the general

public,"[15] *ibid.*, or involved private or personal gain, or that petitioners did not have insurance, intended to gamble, drink liquor, or serve refreshments outside a designated area, or otherwise failed to meet any of the viewpoint-neutral criteria for use of the facilities established by the State and the school district. From all that appears, petitioners' lecture series would have addressed an otherwise permissible issue in an otherwise permissible way. CMSD justified its refusal to permit the lectures solely on the ground that they "appear[ed] to be church related." C.A. App. 352, 359.

Viewed concretely, then, the question in this case is whether a governmental proprietor such as CMSD, having opened its facilities generally for speech on topics of public concern, can constitutionally exclude certain speech on such a topic solely on the basis of the speech's religious point of view, without offering any justification related to the special needs or purposes of the facility in question. But this Court has repeatedly made clear that even in the case of completely nonpublic forums, where the government's power to regulate speech is at its height, the Constitution will rarely tolerate discrimination between other-

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[15] CMSD defines the "general public" for this purpose as "all residents of the school district that form a homogeneous group deemed relevant to the event." Local R. 10. Under that puzzling definition, it would appear that petitioners could have satisfied the statutory requirement by inviting only, for example, local evangelical Christians with children. In fact, of course, petitioners presumably viewed their proposed presentation as of wide general interest, and would have actively encouraged attendance by all members of the Center Moriches community. For these reasons, among others, respondent CMSD's attempt to defend its policies on the ground that they exclude only activities "of interest [only] to • • • specific identifiable groups" or uses "for private purposes not of interest to or [for the] benefit of [the] public in general," CMSD Br. in Opp. 7, is wholly unpersuasive. See also n. 11, *supra*.

wise comparable uses based solely on the views expressed by the speaker. See, *e.g.*, *Krishna Consciousness*, 112 S. Ct. at 2705, 2709 (plurality opinion), 2712 (opinion of O'Connor, J.); *United States* v. *Kokinda*, 110 S. Ct. 3115, 3121-3122, 3124-3125 (1990) (plurality opinion); *Perry*, 460 U.S. at 46. See also *Widmar*, 454 U.S. at 280 (Stevens, J., concurring in the judgment). As the Court stated in *Cornelius*, 473 U.S. at 806 (citations omitted), "[a]lthough a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[16]

It is important to note that a government does have the right to impose viewpoint-based restrictions that are closely related to the core purposes of the forum in question,

[16] See also 473 U.S. at 811-813 (remanding for determination of whether facially reasonable justifications for exclusion of particular speech were "a facade for viewpoint-based discrimination"); *id.* at 832-833 (Blackmun, J., dissenting) (exclusion invalid regardless of forum analysis because based on viewpoint); *id.* at 833 (Stevens, J., dissenting) ("[e]veryone on the Court agrees that the exclusion * * * is prohibited by the First Amendment if it is motivated by a bias against the views of the excluded groups"). Courts citing the restriction on viewpoint discrimination often state, following *Perry*, that a regulation may not be "an effort to suppress expression merely because public officials oppose the speaker's view." See *Perry*, 460 U.S. at 46. We do not intimate that the State of New York or the officials of CMSD "oppose" religion in the sense of being actively hostile to its practice or propagation. We think it obvious, however, that respondents' opposition to the use of school facilities for a lecture on the ground of the lecture's religious perspective on an issue of public concern is "oppos[ition to] the speaker's view" for purposes of *Perry* and subsequent cases.

and the right to choose and advance, in the course of its own activities or those it funds, particular points of view in preference to others. In the context of military training at issue in *Greer* v. *Spock*, for example, even the fact that a prior lecture on the specific topic of drug abuse had been permitted on the military base surely would not have required the government to tolerate a proposed lecture on the virtues of illegal drug use. See 424 U.S. at 838 n.10. See also *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1771-1776 (1991) (government can selectively fund activities in the public interest, without giving equal support to competing alternatives); *Jones* v. *North Carolina Prisoners' Labor Union, supra* (prison administrators can give preference to organizations that they determine will advance penological objectives). But the facts of this case are substantially different. The policy at issue here regulates private (not school-sponsored) use of school facilities, outside of school hours, by members of the general community rather than by students, and for social, civic or recreational – rather than educational – purposes. By opening its facilities for uses such as lectures on matters of public concern, CMSD evinced a determination that such uses would not, as a general matter, interfere with the schools' core mission; having made that determination, the school district is no longer in a position to prohibit a particular proposed use simply on the basis of the speaker's point of view.[17]

[17] In *Greer* v. *Spock*, *supra*, the commander of a military training base was allowed to exclude certain partisan political activities that he determined would interfere with the base's core functions, in part on the ground that excluding such speech was consistent with the American tradition of a politically neutral military. See 424 U.S. at 839. A facially similar argument might be made that exclusion of "religious" speech from public school precincts is permissible in order to maintain a strict separation of church and state. The uses of school

The courts below found, Pet. App. 7a-8a, 48a, that CMSD's exclusion of petitioners' proposed speech was "viewpoint-neutral," apparently on the theory that in this context CMSD would discriminate impermissibly only if it allowed, for example, Catholic but not Protestant groups to use its facilities "for religious purposes." See, *e.g.*, Pet. App. 46a, 44a; N.Y. Att'y Gen. Br. in Opp. 12-13. But favoring secular viewpoints over religious viewpoints is no less discriminatory, for purposes of the First Amendment, than favoring one religious viewpoint over another. See, *e.g.*, *Widmar*, 454 U.S. at 281 (Stevens, J., concurring in the judgment). Moreover, while a government generally has the right to adopt a point of view on an issue of public concern and to favor that view in the allocation of public resources, see *Rust* v. *Sullivan*, *supra*, that right is severely limited where the issue in question is religious: under the Establishment Clause, a government may neither favor one religion over another, nor promote "nonreligion" over religion as a favored point of view. See *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) (government may not "prefe[r] those who believe in no religion over those who do believe"). If CMSD would, as we believe, permit a community lecture on family values from a psychological (or "parapsychological"), sociological, philosophical or

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property at issue here, however, are by definition outside of school hours, involve students only incidentally, and present none of the special dangers of "entanglement," 424 U.S. at 839, described by Justice Powell in his concurring opinion in *Greer*. See 424 U.S. at 844-848. Moreover, this Court has previously rejected the essentially identical argument that a proper concern for preserving church-state separation could justify the exclusion of religious speech from public school forums otherwise open for use by student groups. See *Widmar*, 454 U.S. at 270-277. See also *Westside Community Bd. of Educ.* v. *Mergens*, *supra* (policy of equal access for student religious groups does not violate Establishment Clause).

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secular humanist perspective, it may not prohibit such a presentation from a Christian perspective on the ground—itself invidious—that the same lecture from a Jewish, Moslem or Buddhist perspective would be equally unwelcome.

* * *

In our view, the outcome of this case is controlled by the reasoning and result in *Widmar* v. *Vincent*, *supra*. Having opened its doors as wide as it has, CMSD may not close them just far enough to keep out "religious" speech. If the Court is of a different view, however, then the case can best be decided on the ground that however a local school district may constitutionally limit the public use of its facilities, it simply may not permit a general type of speech, such as lectures on matters of public concern, but exclude a particular speaker on such a topic because he advances a religious point of view.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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